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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. HENRY LLERENA, Defendant and Appellant.	D074275 (Super. Ct. No. SCE369511)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed in part and remanded with directions.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christine Levingston Bergman, and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Henry Llerena was convicted of assault and battery for striking Daniel F. in the face and knocking him to the ground, causing a broken eye socket, a fractured cheekbone, a broken nose, and facial nerve damage. Over defense objections, to help identify Llerena as the perpetrator, the prosecution introduced four phone calls from Llerena, two of which took place while he was in jail on an unrelated parole violation. After the jury convicted Llerena, the court sentenced him to 13 years plus 25 years to life. This included time for prior strikes and mandatory enhancements to the sentences.

Although Llerena challenged the admission of the phone calls on a variety of grounds before and during trial, for the first time on appeal, Llerena contends the admission of the two calls that took place before he was charged with the assault and battery were unfairly prejudicial because they indicate Llerena was in jail on an unrelated charge. Llerena also contends the court abused its discretion by denying his request to strike one of his prior strike convictions in the interest of justice, and the court should have an opportunity to exercise its discretion to strike a prior serious felony conviction under Penal Code[1] section 667, subdivision (a)(1) in light of Senate Bill No. 1393's amendment to section 1385, subdivision (b).

We affirm the court's evidentiary ruling admitting the telephone calls and the court's denial of Llerena's request to strike one of his prior strike convictions under section 1385 in the interest of justice. However, we remand the matter for resentencing

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1 Further section references are to the Penal Code unless otherwise specified.

so the court may consider its newly-acquired discretion under section 667, subdivision (a)(1).

FACTUAL AND PROCEDURAL BACKGROUND

On March 20, 2017, at around 8:00 p.m., Daniel F. drove to an AutoZone near his home to pick up a vehicle battery he had left to charge at the store earlier in the day. As he stepped out of his vehicle, he heard someone call out the name "Alyssa," and he looked to see who it was. When he followed the voice, he saw Alyssa Drane (Drane), his girlfriend's daughter, and he noticed she was with a man. The man stepped toward Daniel F. and called him a pedophile and a child molester. Daniel F. told the man he was lying and "full of shit." In response, the man turned and began approaching Drane aggressively, saying she was a "fucking bitch" who had been lying.[2] Daniel F. was worried the man might hit Drane, so he decided to remove his glasses in case he needed to defend her. The last thing he remembered was turning his back on the man to remove his glasses; he awoke in the hospital a couple days later. Daniel F. was never able to identify the man who attacked him.

Andre Redditt (Redditt), a witness, had gone to AutoZone to replace a car battery. When he pulled into the parking lot, he noticed a male and female walking back and forth across the parking lot, talking to each other. An AutoZone employee helped him remove the battery, and as he walked into the AutoZone, he noticed the male who had been

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2 Drane believed Daniel F. had taken a naked photograph of her sister. Child Protective Services had already investigated this claim at the time of the assault on Daniel F. and found the allegation untrue.

pacing in the parking lot began to approach the driver's side of Daniel F.'s truck. After an AutoZone employee came in and announced there was a fight, Redditt went outside, where he saw Daniel F. lying face down on the ground.

Redditt told police he did not get a good look at the face of the man who was pacing in the parking lot, but he noticed the man had multiple tattoos on one of his arms. He said he was pretty sure the assailant was White or Hispanic and if the assailant were Black, he would know it. He was not able to identify the assailant later from a photo lineup that included Llerena.

When Deputy Nicholas Hvizdzak arrived at the scene, Daniel F. was face-down, limp, bleeding, and unresponsive. AutoZone employee Ben Williams (Williams) noticed the defendant and a girl pacing around the parking lot. He saw the man yell at Daniel F., then hit Daniel F. Daniel F., who did not throw any punches, fell face first onto the ground.

Williams provided the deputy a description of the assailant as a Black male, 25 to 35 years old, five feet, six inches tall, and 200 pounds. Williams later described the assailant as bald and thought he might be African American or Puerto Rican, "like Mexican/[B]lack mix." He did not notice whether the assailant had tattoos. He positively identified Llerena as the assailant in a six-pack photo lineup the following month. The detective described the identification as immediate, strong, and definitive, with no hesitation or qualms.

At the scene, Williams told the deputy about a White, female adult who was there with the assailant. When Daniel F.'s ex-wife[3] arrived at the scene, she described her daughter Drane, and the description matched the description that Williams had provided. The deputy used the information to locate a photograph of Drane, which he showed to Williams. Williams identified Drane as the woman who was with the assailant.

Detective Scott Hill interviewed Drane while she was in jail on an unrelated charge, and Drane told the detective she was with her boyfriend at the time of the crime, and they had been together for about a month. She confirmed her boyfriend called Daniel F. a pedophile or a child molester, and though she did not see much, she did see Daniel F. on the ground. She did not tell the detective her boyfriend's last name, but she said his first name was Henry, and he was a light-skinned, bald, Cuban man with tattoos, who was a Sagittarius, and in his mid-30's. She explained her belongings were in her boyfriend's friend's car, which was going to get towed, and she needed to get her belongings.

The detective used the information Drane provided to print a photograph of the defendant that was used in the photo lineup because Llerena matched Drane's description: Llerena's first name was Henry; his birthday is December 15, making him a Sagittarius; and Llerena was bald and had tattoos on his arms and a "Cubano" tattoo across his chest.

At trial, Drane testified she had seen Llerena before but did not recognize him by his full name, did not consider him a boyfriend at the time of the crime, was not in the

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3 The record references the same person as Daniel F.'s girlfriend and his ex-wife.

AutoZone parking lot the day of the crime, and did not see Daniel F. get punched. She denied staying in the defendant's vehicle or keeping her belongings there. She also testified she had been under the influence at the time she was questioned, and she had used drugs on and off, including methamphetamine daily during the year and a half preceding the interview. Detective Hill testified that Drane seemed like she may have been influenced by methamphetamine at the time of the interview because her words were slow and seemed slurred, and her talk was mumbled at times, but he did not think she was intoxicated, and she gave reasonable responses to his questions, so he did not conduct a drug evaluation of Drane.

The prosecution also introduced four telephone calls, two made by Llerena while he was in jail for an unrelated parole violation. The first call was made March 29, 2017 at 7:16 a.m., to Meliss Valdez (Valdez), with whom he shared a child. In that call, he asked Valdez to get a message "to the person in the car" and to bring the phone to his brother, Michael. Once Michael was on the line, Llerena asked him to go to the car because he was really worried about the girl by his car; he wanted his brother to tell her that he was locked up and not avoiding her, and he asked Michael to get the girl's phone number so Llerena could call her because she had no identification and would not be able to see him. He asked his brother to also call a woman named Dyan and tell her Llerena loved her.

After Llerena met with a detective, he called Dyan Savery (Savery) on March 29, 2017 at 4:53 p.m. Llerena told Savery there was another girl who thought she was Llerena's girlfriend, but she was not. He said he could not say the girl's name because it

would be of some significance to do so. He also commented that it would be of some benefit if this other person were not located now by certain people.

Police arrested Llerena on April 5, 2017 and charged him with assault by means likely to produce great bodily injury (count 1; § 245, subd. (a)(4)) and battery with serious bodily injury (count 2; § 243, subd. (d)). He was also charged with personally inflicting great bodily injury. (§§ 12022.7, subd. (a)), 1192.7, subd. (c)(8).) He was further charged with having been convicted of two serious felony priors (§§ 667, subd. (a)(1), 668, & 1192.7, subd. (c)), and with two serious or violent felony strike priors (§§ 667, subd. (b)-(i), 1170.12, & 668).

The prosecutor moved in limine to admit portions of four jail calls Llerena made, the two March 29, 2017 phone calls, a phone call April 5 at 2:36 p.m., and one April 6 at 7:41 a.m., arguing they were relevant, tied Llerena to the assault on Daniel F., and were more probative than prejudicial. Defense counsel objected to the March 29 calls for various reasons, including because they violated his privacy, created a *Miranda* issue, were inadmissible hearsay by the other speakers on the phone, were incomplete as redacted, were speculative, were prejudicial because they portrayed Llerena as a cheating boyfriend, because they referenced him being in jail, and because they were cumulative with other evidence. Defense counsel alternatively sought to include the text of defendant's conversations in their entirety. The court overruled the defense objections to the March 29, 2017 telephone calls. The prosecution played redacted portions of these phone calls, and transcripts of the two March 29 calls were provided to the jury.

Defense Case

The defense challenged the identification of Llerena by questioning Drane's credibility and the selection of pictures in the photo lineup. The defense also challenged Redditt's identification, noting Redditt previously said that if the person in the parking lot were a Black male, he would know it, and he was pretty certain the male was White or Hispanic.

Verdict and Sentencing

The jury found Llerena guilty of assault with force likely to produce great bodily injury (count 1; § 245 subd. (a)(4)) and battery with serious bodily injury (count 2; § 243, subd. (d)), and it found he had personally inflicted great bodily injury on Daniel F. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).)

The court sentenced Llerena to 25 years to life on count 1 (§ 245, subd. (a)(4)). The court added a consecutive three-year term for personal infliction of great bodily injury. (§ 12022.7, subd. (a).) The court added five years for each prior serious felony conviction (§ 667, subd. (a)(1)) and found Llerena ineligible for probation based on prior strikes. It stayed all of the sentence for count 2 and the corresponding enhancements. The court denied Llerena's request to strike a prior strike in the interest of justice, noting ineffective earlier lenient sentences and the desire to protect society. Ultimately, Llerena was sentenced to 13 years plus 25 years to life.

DISCUSSION

A

Admission of Recorded Jail Calls

Llerena contends the admission of the jail phone calls was improper because their content was irrelevant, inadmissible hearsay that was unduly prejudicial.

At the time of trial, defense counsel objected to the introduction of four jail phone calls, two made March 29, 2017, one April 5, and one April 6. Only the two calls made in March were admitted, and they are subject to this appeal.

1. *Legal Principles*

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Hearsay, a statement offered to prove the matter asserted and made by someone other than a witness testifying in court, is inadmissible unless it falls within an exception to the hearsay rule (Evid. Code, § 1200, subds. (a) & (b)) and is relevant (Evid. Code, § 210). Additionally, relevant evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; see *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1613 (*Hernandez*).) If a party proponent makes a relevant out-of-court statement that is not excludable under Evidence Code section 352, the statement may be admitted against the party declarant. (Evid. Code, § 1220; *People v. Castille* (2005) 129 Cal.App.4th 863, 875-876 (*Castille*).)

We review hearsay determinations for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Additionally, we review " 'a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion.' " (*People v. Jones* (2017) 3 Cal.5th 583, 609.) " 'A trial court has "considerable discretion" in determining the relevance of evidence. Similarly, the court has broad discretion under Evidence Code section 352 to exclude even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects.' " (*Jones*, at p. 609, internal citations omitted.) A trial court abuses its discretion when it makes an error of law (*People v. Patterson* (2017) 2 Cal.5th 885, 894) or its ruling extends beyond the bounds of reason (*People v. Kopatz* (2015) 61 Cal.4th 62, 85). "We do not substitute our judgment for that of the trial court and may grant relief only when the asserted abuse of discretion constitutes a miscarriage of justice." (*Hernandez, supra,* 226 Cal.App.4th at p. 1613.)

2. *Relevance & Hearsay*

Llerena contends the content of the jail phone calls was not relevant because it lacked probative value and was too speculative to meet the test of relevance or support the inference that Drane was the girl in the car because her name was not mentioned in the calls and no other information offered during the calls supports the inference. Moreover, Llerena contends that because none of the individuals with whom Llerena spoke on the phone testified at trial, there is no evidence they understood Llerena was talking about Drane.

To support his contention that the content of the phone calls is too speculative to be relevant, Llerena cites to *People v. Allen* (1976) 65 Cal.App.3d 426 (*Allen*) (disagreed with on other grounds by *People v. Green* (1980) 27 Cal.3d 1). In *Allen,* the defendant was charged with stealing jewelry from a woman while staying overnight in her home, then handing off the jewelry to an accomplice. (*Allen*, at pp. 430-432.) The defendant told the victim and law enforcement that he had some good connections and had ways of determining where stolen jewelry was if anyone tried to sell it. (*Id*. at pp. 431-432.) He also made a phone call, during which he described the stolen jewelry and told the person he wanted to be informed if the jewelry were sold. (*Id*. at p. 432.) Prosecutors theorized that the defendant had second thoughts about the theft after police arrived, so he called the accomplice in an effort to regain possession of the jewelry to return it to the victim. (*Ibid*.)

In *Allen,* the statements were not offered to prove the matter expressly asserted therein, i.e., that he knew a person who dealt in sold goods who could let him know when the stolen jewels became available. (*Allen*, *supra*, 65 Cal.App.3d at p. 433.) Instead, the statements were offered to prove the truth of the matter implied by the express statement: the defendant stole the victim's jewelry. (*Ibid*.) That implication, the attorney general theorized, was a party admission, bringing it within a hearsay exception. (*Ibid*.)

The appellate court explained an implication may be found "whenever it is reasonable to conclude: (1) that declarant *in fact intended* to make such implied statement, or (2) that a recipient of declarant's express statement would *reasonably believe* that declarant intended by his express statement to make the implied statement."

(*Allen*, *supra*, 65 Cal.App.3d. at p. 434.) The appellate court determined that it was not reasonable to conclude that the defendant intended to imply he had taken the jewelry; nor was it reasonable to conclude a recipient of the statement would believe the defendant implied he had committed the theft. (*Id*. at p. 434.) Instead, the "only reasonable inferences to be drawn from the defendant's statements [were] that defendant knew and associated with persons dealing in stolen property." (*Ibid*.) Because there was no reasonable inference that the defendant was the thief, the evidence was too speculative to be deemed relevant. (*Ibid*.)

In contrast, here some of the statements were offered for their explicit meaning, and where they were offered for their implied meaning, the inferences expressed by the prosecution were probative and fell within a hearsay exception. For example, the prosecutor offered Llerena's statement to Valdez during the first call that he needed to get a message "to the person in the car" to prove Llerena was trying to reach the person in the car. Similarly, the prosecution wanted to introduce Llerena's statement to his brother that he was worried about the girl by his car and he wanted his brother to tell her Llerena was locked up and get her phone number so Llerena could reach her to prove exactly that. During his closing argument, the prosecutor explained the first phone call showed Llerena was worried about the girl in the car.

The statements were also offered for their implicit meaning, to draw a connection between Llerena and Drane, and ultimately to demonstrate Llerena's consciousness of guilt, establishing an exception to the hearsay rule. For example, although Llerena never named Drane during his phone calls, his connection to Drane was implied during the

second phone call, after the detective had interviewed Llerena regarding the crime against Daniel F. Llerena talked to Savery and reiterated he needed his brother to go to the car to talk to the girl. Llerena also told Savery the name would be of some significance now, at the time of the call, and it would be of some benefit if the other person were not located by certain people. Llerena spoke in coded language because he intended his brother and Savery to know whom he was discussing without others listening to have the information. He wanted Savery to understand he could not name the girl because it could incriminate him.

While the only inference in *Allen* was that defendant associated with persons who dealt in stolen property (*Allen, supra*, 65 Cal.App.3d at p. 434), here the inferences connected Llerena more directly to the crime. Moreover, the statements on the phone calls were not speculative because they were corroborated by other evidence, including Drane's identification of her boyfriend, a bald man named Henry, who was a Sagittarius, had tattoos, and was Cuban, all of which matched Llerena. This information, along with evidence of Drane's personal belongings in the vehicle Llerena was using, identified Llerena with such strength that the defense attorney called the introduction of the calls "overkill" and "double kill." Thus, the trial court could, in the exercise of sound discretion, conclude the phone calls were relevant. The calls had a tendency in reason to prove a disputed fact of consequence to the case (Evid. Code, § 210), namely defendant's identity. Moreover, because the statements connected Llerena to Drane and indicated he felt consciousness of guilt, the statements were a party admission, an exception to the hearsay rule. (See *Castille, supra*, 129 Cal.App.4th at pp. 875-876.)

3. *Unfair Prejudice*

Llerena contends the March 29 phone calls were unduly prejudicial because they imply he improperly influenced Drane's trial testimony without evidence to support such a claim. However, it was reasonable for the court to conclude its probative value outweighed any prejudice it caused. Llerena's statement, "It would be of some benefit . . . [¶] . . . [¶] . . . now. [¶] . . . [¶] . . . [¶] if that person was not located," by certain people, held probative value because it showed consciousness of guilt and helped connect him to the scene of the crime.

The prosecutor did not use the statement to imply Llerena or his family had attempted to convince or actually convinced Drane to change her testimony at trial. In closing argument, the prosecutor played the phone call and stated, "Alyssa Drane, who came in here and said she didn't know the defendant when she obviously did, this defendant was telling his girlfriend, [Savery], 'It would be of some benefit now if that person was not located.' " Then he argued the conversation incriminated Llerena, using coded language. He explained this telephone call was "the sprinkles on top of the sundae," because it was "consistent with all the evidence in the case," in particular with Drane and Williams identifying Llerena, because Llerena effectively did exactly what he tried not to do during the call: he incriminated himself. Additionally, the defense had an opportunity to question Drane about what caused her change in testimony, but those questions were not asked. Thus, we cannot conclude the trial court's decision to overrule the objection was an abuse of discretion.

4. *Forfeiture*

Llerena also contends the March 29 phone calls were unfairly prejudicial because the jury could determine that they took place when Llerena was incarcerated for an unrelated offense. Although defense counsel objected to the introduction of the March 29, 2017 telephone calls on various grounds, Llerena concedes he did not argue they were prejudicial because they placed Llerena in jail on an unrelated matter. Nor does Llerena contend defense counsel objected to the inclusion of the dates on the transcriptions. Instead, he argues the issue was preserved on appeal because defense counsel objected to the jail call evidence as irrelevant and prejudicial for other reasons and because defense counsel objected to Drane's reference to Llerena being in jail during her interview with law enforcement. We are not persuaded.

The Supreme Court has " 'consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.' " (*People v. Partida* (2005) 37 Cal.4th 428, 434 (*Partida*); see *People v. Dykes* (2009) 46 Cal.4th 731, 778-779 [evidentiary claim forfeited for failure to object at trial on basis stated in appellate claim].) Defense counsel's objections at trial regarding relevancy and prejudice related to the substance of the calls did not preserve an objection on this alternate ground. (Evid. Code, § 353 [requiring record of objection that identifies the specific ground]; see *Partida*, pp. 433-434.) Nor did the objection to Drane's interview referencing Llerena's location in jail preserve the same argument regarding Llerena's jail phone calls. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [no consideration of erroneous rulings when objection could have been made but was not].)

Finally, application of the forfeiture rule does not work an injustice here. Accordingly, Llerena has forfeited his objection that the date on March 29 calls inform the jury that he was in jail on an unrelated charge, causing unfair prejudice.

5. *Ineffective Assistance of Counsel*

Llerena further contends the failure to object did not forfeit his right to challenge admission of the recorded jail calls because it demonstrates ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, Llerena must show his attorney's performance (1) fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) We evaluate counsel's conduct with deference and "indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*People v. Dennis* (1998) 17 Cal.4th 468, 541.)

" ' "[I]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*); *People v. Cash* (2002) 28 Cal.4th 703, 734 (*Cash*) [" ' " 'record must affirmatively disclose the lack of rational tactical purpose for challenged act or omission.' [Citation.]" ' [Citation.]"].) "A claim of ineffective assistance in such a case is

more appropriately decided in a habeas corpus proceeding." (*Mendoza Tello*, at pp. 266-267.)

We are not persuaded by Llerena's argument that there is no tactical or strategic explanation because defense counsel objected to similar evidence from the pretrial interview with Drane. Counsel's willingness to object to different evidence on the grounds raised here on appeal indicates an awareness of those grounds as a basis for the objection. This suggests she may have had a reason not to challenge the jail phone calls on those grounds. Absent some declaration or other information for her decision, we must reject this argument on appeal. (*Mendoza Tello*, *supra*, 15 Cal.4th at p. 266; *Cash*, *supra*, 28 Cal.4th at p. 734.)

Moreover, there is no reasonable probability a juror would have voted to acquit Llerena. (See *Partida*, *supra*, 37 Cal.4th at p. 439 [applying *People v. Watson* (1956) 46 Cal.2d 818 to analyze evidentiary error involving state law]; *People v. Harris* (2005) 37 Cal.4th 310, 336.) The admission of this evidence did not violate the fundamental fairness of the trial, and "[a]bsent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*Partida*, at p. 439.)

To establish prejudice, " '[i]t is not enough for a defendant to show that the errors had some conceivable effect on the outcome of the proceeding" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217); Llerena must demonstrate there is a reasonable probability the results would have been different. (*Cash*, *supra*, 28 Cal.4th at p. 734.) Although

jurors could have compared the date of arrest to the date of the calls to determine that Llerena was incarcerated on a different matter, this information was not presented directly to the jury. Additionally, the evidence against Llerena was strong even without the telephone calls, as discussed *ante,* because Williams and Drane both identified Llerena as Daniel F.'s attacker. Moreover, Redditt's description of the attacker as Hispanic or White did not undermine Williams's identification because Redditt did not get a good look at the attacker's face and was in the store when the assault occurred. Finally, even defense counsel recognized the volume and weight of the evidence absent the telephone calls, telling the court their admission was "overkill" and "double kill" to the already-strong evidence identifying Llerena as the attacker. It is not reasonably probable the verdict would have been more favorable to Llerena absent the admission of the redacted, March 29 phone calls. Thus, the failure to object was not ineffective assistance of counsel, and Llerena has forfeited this claim.

B.

Section 1385, Prior Strike Conviction

Llerena contends the court abused its discretion by denying his request to strike one of his prior strike convictions because they were remote in time from the current conviction, and the incidents leading to those convictions were close in time to each other. Additionally, because the offenses were non-homicide and application of a strike to one of them would still result in a long sentence, Llerena argues the interest of justice warrants one be struck. We disagree.

Trial courts have discretion to dismiss "strike" prior convictions in limited cases (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530), when the dismissal is "in furtherance of justice" (§ 1385; *People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1213). A trial court's failure to strike a prior conviction allegation is subject to review for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 371, 374; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434-435 (*Gillispie*).) The court must consider both the defendant's constitutional rights and the interests of society. (*Romero*, at p. 530.) Moreover, "[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, [the reviewing court] shall affirm the trial court's ruling, even if [it] might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) A court abuses its discretion when its decision exceeds the bounds of reason. (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Here, the court considered the probation report, as well as Llerena's motion to strike a strike prior, the two strike cases, the statement in mitigation, and the People's statement in aggravation. The court also entertained a statement by the victim during its consideration of the motion to strike a prior. The court appropriately considered the nature of Llerena's prior crimes, as well as the one for which he was convicted here. It was unpersuaded by Llerena's argument that the previous strike convictions were remote in time and close to each other, noting Llerena experienced some leniency when he was sentenced to nine years for robbery instead of the recommended 16 years and again in a carjacking case, where the recommendation was for 10 years and the court sentenced him

to probation. This leniency did not prevent Llerena from serving time in prison in connection with those crimes.

Moreover, although the trial court is not required to offer its reasons for declining to exercise discretion under section 1385 (*Gillispie, supra*, 60 Cal.App.4th at p. 433), the explanation the court offered on the record here demonstrates the court's reasonableness in declining to strike the prior. (See *id*. at p. 434 [" '[A]ll that is required on the appellate record is a showing that the court was aware of its discretion to select an alternative disposition.' "].) The court was bothered by Llerena's willingness to strike men and women, strangers and women he knew, and mostly in the face. It identified nine separate incidents of Llerena striking people in the face. The court explained: "[A]t some point, I, as a sentencing judge, have to worry about the future of . . . protecting society. . . . How many times do people have to be victimized when—at one point, a court has to say enough is enough, and that's why I didn't strike your priors." While Llerena's attorney argued that Llerena would serve a lengthy sentence even if the court struck a strike prior, the court determined that it would not serve the interests of justice to strike the prior in this case. Thus, we conclude there was no abuse of discretion.

C

Section 667 Enhancements for Priors

At the time of sentencing, the trial court lacked discretion to strike a prior serious felony conviction in connection with the five-year enhancement under section 667, subdivision (a)(1). (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Section 667 required imposition of the enhancement under subdivision (b) of section

1385, which did "not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).) However, Senate Bill No. 1393, which eliminated the mandatory imposition of five-year terms for serious prior felony convictions, became effective January 1, 2019, and it applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) Here, the court applied the enhancements, as required at the time. Accordingly, we remand the matter for resentencing. On remand, the trial court should contemplate its discretion to strike a prior serious felony conviction.

DISPOSITION

The sentence is vacated. The matter is remanded to the trial court with directions to conduct a resentencing hearing to consider its discretion in striking prior serious felony enhancements. The trial court shall prepare an amended abstract of judgment reflecting the sentencing decision. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.